



BERMUDA INITIAL COIN OFFERING (ICO) LEGISLATION

Bermuda is quickly becoming a world leader in the financial technology (Fintech) sector by putting into place a bespoke Fintech legislative and regulatory regime. Globally, financial markets and systems are becoming more efficient and the use of Fintech is becoming more apparent. Bermuda is positioning itself as a jurisdiction that can provide the certainty, proper corporate governance, and appropriate consumer protection required for a thriving Fintech industry and for those looking to further develop and invest in such technology. Bermuda's first major move from a legal standpoint is the implementation of legislation that governs Initial Coin Offerings (ICOs).

Initial Coin Offerings, or ICOs, are fundraising mechanisms similar to Initial Public Offerings, or IPOs, except that tokens, rather than shares, are issued. Bermuda has successfully launched the world's most progressive ICO legislation in the form of the Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 which came into effect on 9 July, 2018 and the Companies (Initial Coin Offering) Regulations 2018 and Limited Liability Company (Initial Coin Offering) Regulations 2018 which came into effect on 10 July, 2018 (**ICO Legislation**).

ICO Legislation

The ICO Legislation applies to companies issuing ICOs and imposes certain legal requirements which a company must comply with, including publishing an offering document or 'white paper' with certain disclosures.

There are substantial penalties under the ICO Legislation for anyone who knowingly makes or authorises untrue statements in a white paper including potential fines of up to \$250,000 and/or imprisonment for a period of five years. The ICO Legislation aims to not only provide certainty for those wanting to have an ICO but it also aims to provide protection for those looking to purchase tokens or coins via an ICO.

Application and Effect

The ICO Legislation will make an ICO a restricted business activity, meaning that any company wishing to launch an ICO will require the consent of the Minister of Finance under the ICO Legislation. Whilst a company will not be

prevented from being incorporated pursuant to the typical processes provided by the Companies Act 1981 (as amended), ministerial consent is required prior to the ICO.

Under the ICO Legislation, an ICO is defined as an offer by a company to the public to purchase or otherwise acquire digital assets. The reference to offering digital assets 'to the public' includes offering them to any section of the public. 'Digital assets' include anything that exists in binary format and comes with the right to use it and includes a digital representation of value that:

- a) is used as a medium of exchange, unit of account, or store of value and is not legal tender, whether or not denominated in legal tender;
- b) is intended to represent assets such as debt or equity in the issuing company;
- c) is otherwise intended to represent any assets or rights associated with such assets; or
- d) is intended to provide access to an application or service or product by means of blockchain.

It is worth noting that any affinity or rewards program which does not permit value to be taken from or exchanged for legal tender, bank credit or any digital asset, falls outside the scope of the ICO Legislation. Similarly, any digital representation of value issued by or on behalf of a publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform are excluded.

Any company submitting an application requesting consent must contain the following minimum information relating to the ICO:

- the name of the project and the names of the project managers;
- the name of the applicant, including addresses, email addresses and websites and any other jurisdiction in which the applicant is registered;
- the details of all persons involved with the ICO including the digital asset issuer, the owner of the platform, ICO organisers and other such information;
- confirmation as to whether any one or more of the persons referred to above have applied for or been granted a licence, permission or other authority under any law relating to the proposed ICO or otherwise relating to financial markets in any other country and, if so, the relevant details;
- information about the project organisation and project planning including the project phases and milestones and estimated time for delivery;
- key features of the product or service to be developed;
- the proposed market participants that the ICO seeks to target and the proposed jurisdiction or jurisdictions;
- whether there are any restrictions regarding participants;

- information regarding the technologies to be used and including whether distributed ledger technology or other new or existing technologies will be used (and whether this is an open source project);
- the means by which the ICO will be financed;
- the amount of money equivalent (in Bermuda dollars) that the ICO is intended to raise by reference to the number of digital assets; and
- whether such funds have already been allocated to a specific project and how any surplus funds would be handled.

There are also minimum requirements in relation to information that must be submitted describing the digital asset issue as well as information regarding compliance features as set out in the ICO Legislation. The information on compliance must include a description of the procedures or protocol that will be used to confirm the identities of the participants in the ICO as well as description of the technical standards or software, blockchain or distributed ledger technology that will be used to identify participants in the ICO.

Subject to receiving consent from the Minister of Finance, the company must publish an ICO white paper in electronic form and must also file a copy of the white paper with the Bermuda Registrar of Companies (subject to specific statutory exemptions). There are certain exemptions to the filing requirement including if the digital assets are listed on either an appointed stock exchange or an appointed digital asset exchange and the rules of the appointed stock exchange or appointed digital asset exchange do not require the company to publish and file an ICO white paper.

Compliance

Any company issuing an ICO must ensure it applies appropriate measures to identify and verify the participants in the ICO. Appropriate measures include identifying relevant participants based on documentation and verifying natural persons carrying out transactions, as well as conducting enhanced due diligence whenever necessary (e.g. if a person or a transaction is from or in a country that has been identified as having a higher risk by the Financial Action Task Force).

The identification and verification of participants should occur prior to the issuance of any digital asset, subject to certain exemptions which include if the rights and functionalities are such that the digital asset can only be used for services and products provided by the ICO issuer.

The compliance measures set out in the ICO Legislation also include a requirement for internal compliance audits with respect to the conduct of an ICO and financial operations (including financial expenditures, if any) connected to the ICO as well as the preparation of a compliance report which must be filed with the Registrar, within 90 days of completion of the ICO.

ICO White Paper

The ICO white paper must contain the following minimum information:

- a) the name and the address of the registered office or principal office of the promoters;
- b) the name, description and titles of the officers of the promoter;
- c) the business or proposed business of the company;
- d) a description of the project, the proposed timeline for the project including any proposed project phases and milestones;
- e) the amount of money equivalent (in Bermuda dollars) that the ICO is intended to raise;
- f) the disclosure as to the allocation of the amounts intended to be raised amongst the classes of any issuance (pre-sale, post-ICO etc.);
- g) any rights or restrictions on the digital assets that are being offered;
- h) date and time of the opening and closing of the offering;
- i) general ICO risk warning:
 - (i) information regarding any substantial risk to the project which are known or reasonably foreseeable;
 - (ii) information as to a person's rights or options if the project which is the subject of the ICO in question does not proceed;
 - (iii) description of rights (if any) in relation to the digital assets that are being offered;
 - (iv) information regarding any disclaimer in respect of guarantees or warranties in relation to the project to be developed or any other assets related to the ICO; and
- j) a statement as to how personal information will be used.

It is important to note that the white paper must remain accurate and must be updated if any of the minimum required information listed above changes. Also, a person is not a promoter for purposes of an ICO solely by virtue of his provision of professional services to the company in relation to the ICO.

Summary

The ICO Legislation represents a significant step in Bermuda's plan to become a global leader in the Fintech industry.

As the Fintech space continues to evolve, BeesMont's dedicated Fintech Team is actively engaging with relevant Government parties and the Bermuda Monetary Authority and advising clients who operate or intend to operate in Bermuda's Fintech environment.

At BeesMont Law Limited we strive to provide the highest standard of legal service for our clients through our responsive, thorough and innovative approach. We have a friendly and dynamic team who are approachable and sensitive to the commercial and practical needs of our clients, for whom we seek to provide tailored solutions. BeesMont Law Limited is a professional company incorporated with limited liability in Bermuda.

This article is intended for informational purposes only and is not a substitute for legal advice.

Please do not hesitate to contact Stephanie Paiva Sanderson, spsanderson@beesmont.bm, or your usual contact at BeesMont Law Limited to discuss your Fintech needs.

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